

No. 1243

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HENRY WINTERS et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

FILE
SEP 28

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the District of Montana.

INDEX.

	Page
Affidavit of John W. Acher	57
Affidavit of James N. Cook and John D. Blackstone	70
Affidavit of Thomas Downen	52
Affidavit of John Matheson	48
Affidavit of D. E. Martin.....	60
Affidavit of John Prosser.....	55
Affidavit of J. S. Roberts.....	61
Affidavit of N. A. Sharpless	78
Affidavit of Cal. C. Shuler.....	35
Assignment of Errors	90
Bill of Complaint	5
Bond on Appeal	94
Caption	4
Certificate, Clerk's, to Transcript	97
Citation	96
Clerk's Certificate to Transcript.....	97
Complaint, Bill of	5
Interlocutory Order	86
Memorandum Order	83
Opinion	83

	Page
Order Allowing Appeal.....	93
Order Allowing Appeal, Petition for.....	88
Order, Interlocutory.....	86
Order, Memorandum.....	83
Order for Printing Record.....	3
Order to Show Cause.....	21
Petition for Order Allowing Appeal.....	88
Response of Cook's Irrigation Company.....	28
Response of Henry Corregan.....	63
Response of Agnes Downen.....	44
Response of Empire Cattle Company.....	31
Response of Matheson Ditch Company.....	46
Response of Chris Kruse.....	29
Response of Andrew H. Reser et al.....	38
Response of Henry Winter.....	66
Stipulation and Praeceptum.....	1
Temporary Restraining Order.....	24
Testimony on Behalf of Defendants:	
Thomas M. Everett.....	83
W. R. Logan.....	80
C. T. Prall.....	82

*In the United States Circuit Court of Appeals, for the Ninth
Circuit.*

MOSE ANDERSON, HENRY WIN-
TERS, LOUDEN MINUGH, JOHN
W. ACKER, MINNIE GANNAWAY,
KIT LEONARD, CHRIS KRUSE,
FRANK RAKITA, AGNES DOWNS,
THOMAS DOWNS, JOHN BUCK-
LEY, BERTHA RESER, LYDIA
RESER, EZRA T. RESER, AN-
DREW H. RESER, L. EREAUX,
HENRY CORREGAN, W. M. WILL-
IAMS, MATHESON DITCH COM-
PANY, (a Corporation), COOK'S IR-
RIGATION COMPANY, (a Corpora-
tion), and EMPIRE CATTLE COM-
PANY (a Corporation),

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMER-
ICA,

Defendant in Error.

Stipulation and Praeceptum.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the following parts of the record submitted from the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, be printed, for consideration of this Court on appeal, to wit:

The bill of complaint.

Order to show cause.

Temporary restraining order.

Response of Matheson Ditch Company and accompanying affidavits.

Response of Henry Winter.

Response of Henry Corregan.

Response of Agnes Downen.

Response of Andrew H. Reser et al.

Response of Empire Cattle Company and accompanying affidavit.

Response of Cook's Irrigation Company.

Response of Chris Kruse.

Affidavit of James N. Cook and John D. Blackstone.

Affidavit of N. A. Sharpless.

Testimony of W. R. Logan, C. T. Prall and Thomas M. Everett.

Opinion of the Court.

Final interlocutory order.

Petition for order allowing appeal, assignment of errors and order allowing appeal.

Bond on appeal.

Citation.

Certificate of clerk.

Omit title of court and cause in full on all papers, excepting the first page, and insert in place and stead thereof: "Title of Court, Title of Cause."

Omit all indorsements on papers, excepting: "Filed and entered (giving the date), George W. Sproule, Clerk," and insert Approval of Bond.

Omit all other papers.

It is further stipulated that the said cause shall be heard upon the assignment of errors set forth in the petition for an appeal.

Dated this 29th day of August, A. D. 1905.

E. C. DAY,

JAMES A. WALSH,

Solicitors for Plaintiffs in Error.

CARL RASCH,

United States District Attorney, Solicitor for Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY WINTERS et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order for Printing Record.

To Frank D. Monckton, Clerk of the Above-named Court.

Sir: You will please print the record in the foregoing entitled action, pursuant to the foregoing stipulation.

E. C. DAY,

JAMES A. WALSH,

Solicitors for Plaintiffs in Error.

[Endorsed]: Circuit Court of Appeals, Ninth Circuit. Henry Winters et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Stipulation and Praecipe. Filed Sept. 2, 1905. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

IN EQUITY.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MOSE ANDERSON, HENRY WINTERS, LOUDEN MINUGH, JOHN W. ACKER, MINNIE GANAWAY, KIT LEONARD, CHRIS KRUSE, FRANK RAKITA, AGNES DOWNS, THOMAS DOWNS, JOHN BUCKLEY, BERTHA RESER, LYDIA RESER, EZRA T. RESER, ANDREW H. RESER, L. EREAUX, HENRY CORREGAN, W. M. WILLIAMS, MATHESON DITCH COMPANY, (a Corporation), COOK'S IRRIGATION COMPANY, (a Corporation), and EMPIRE CATTLE COMPANY (a Corporation),

Defendants.

No. 747.

Caption.

Be it remembered, that on the 26th day of June, A. D.

1905, the complainant filed its bill of complaint herein, which said bill of complaint is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

The United States of America, your orator, by Carl Rasch, United States Attorney for the District of Montana, for and in its own behalf, and for and in behalf of its wards, the Indians residing upon the Fort Belknap Reservation in the State and District of Montana, files this bill of complaint against Mose Anderson, Henry Winters, Loudon Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, (whose given or christian name is to your orator unknown), and W. M. Williams, residents of the State and District of Montana, the Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, defendants herein, and thereupon your orator complains and says:

First.

That the said defendant, Matheson Ditch Company, ever since the 13th day of April, A. D. 1899, has been, and at the time of the commission of the wrongs and

grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Second.

That the said defendant, Cook's Irrigation Company, ever since the 13th day of May, A. D. 1896 has been, and at the time of the commission of the wrongs and grievances hereinafter complained of, was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and is doing business in said State and District of Montana.

Third.

That the said defendant, Empire Cattle Company, ever since the 23d day of June, A. D. 1897, has been, and at the time of the commission of the wrongs and grievances hereinafter complained of was, and said defendant is now a corporation organized and existing under and by virtue of the laws of the State of Montana, and doing business in said State and District of Montana.

Fourth.

That heretofore, to wit, on or about the 1st day of May, A. D. 1888, a large tract of land situate within the northern part of the then Territory, now State of Montana, and then and there and thereafter, and at all times hereinafter mentioned, the property of your orator the said United States, was reserved and set apart by

the said United States as an Indian Reservation as and for the permanent home and abiding place of the Gros Ventre and Assiniboine bands or tribes of Indians in the State (then Territory) of Montana, designated and known as the Fort Belknap Indian Reservation, that the said Indian Reservation is now situated in the county of Choteau, in the State and District of Montana, and its boundaries were at the said time of the creation of said reservation fixed and defined as follows, to wit:

Beginning at a point in the middle of the main channel of Milk River, opposite the mouth of Snake Creek; thence due south to a point due west of the western extremity of the Little Rocky Mountains; thence due east to the crest of said mountains at their western extremity, and thence following the southern crest of said mountains to the eastern extremity thereof; thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk River, in the middle of the main channel thereof, to the place of beginning.

That ever since the said 1st day of May, A. D. 1888, the said aforementioned **and described** tract of land has been, and the same is now an Indian Reservation, and the property of your orator subject to the occupancy of the said bands or tribes of Indians, and the same ever since the 1st day of May, A. D. 1888, has been and is now occupied and inhabited by the said bands or

tribes of Indians as and for their permanent home and abiding place.

Fifth.

That the said Fort Belknap Indian Reservation extends to the middle of the main channel of said Milk River, which said river is a non-navigable stream and water course, the said line in the middle of the main channel of said Milk River being the northern boundary line of said reservation. That large portions of the lands embraced within said reservation are well fitted and adapted for pasturage and the grazing and feeding thereon of stock and horses and cattle. That other large portions of said reservation are adapted for, and susceptible of farming and cultivation and the pursuit of agriculture, and productive in the raising thereon of crops of grass, grain, and vegetables. That ever since the establishment of said **Indian Reservation** large herds of cattle, the property of your orator and of the Indians residing upon said reservation, and large numbers of horses, the property of said Indians, have been and are now feeding, pasturing and grazing upon said reservation and upon the lands within said reservation being and situate along and bordering upon said Milk River.

Sixth.

That such portions of the said Fort Belknap Indian Reservation as are adapted and fitted for farming and cultivation and the pursuits of agriculture thereon, as aforesaid, are of a dry and arid character, and in order to make the same productive, and for the purpose of

successfully raising thereon crops of grain, grass, and vegetables, require large quantities of water for the purpose of irrigating the same. That without water for the irrigation of said lands, the same would be and remain unproductive, and it would be impossible to successfully raise upon said lands crops of grain, grass, and vegetables. That heretofore, in the year 1889, your orator erected and constructed houses and buildings upon said reservation for the occupancy and residence of the United States Indian agent and the officers of your orator having the charge and superintendency of said reservation and the Indians residing thereon, generally known as the Fort Belknap Agency, and ever since the said year 1889, the said buildings and premises have been occupied by the United States Indian Agent and the officers and agents of your orator having charge and superintendency of said reservation. That the said agency depends entirely for its water supply for domestic, culinary and irrigation purposes upon the waters of the said Milk River, and that at all times, ever since the erection of said houses and buildings and the establishment of said agency, your orator has been obliged and is now obliged to depend for its water supply for said agency and for the purposes aforesaid upon the waters of said Milk River. That heretofore, and long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to wit, in the year 1889, your orator through its officers and agents at said Fort Belknap Agency, for the purpose of obtaining the requisite amount of water for

domestic, culinary and irrigating purposes for said agency appropriated, took and diverted from the channel of said Milk River, by means of pumps, pipes and waterways a large amount, to wit, a flow of one thousand miners inches of the waters of said Milk River, and by means of pumping the same out of the channel of said Milk River, and by ditches, pipes and waterways conducted the said waters of said river, so taken and diverted from said river as aforesaid, from the channel of said river to the said agency buildings and premises, and after so conducting the said waters to said agency buildings and premises, used the same for domestic, household and culinary purposes, and also for the irrigation of lands adjacent to, connected with and surrounding said agency buildings and premises, and by means of the use of said waters for irrigation purposes raised upon said premises adjacent to and connected with said agency crops of grain, grass and vegetables. That thereafter, but long prior to the commission by the said defendants of the wrongs and grievances hereinafter complained of, to wit, on the 5th day of July, A. D. 1898, your orator and the Indians residing upon said reservation, for the purpose of bringing and conducting water to and upon the lands of said Fort Belknap Indian Reservation with which to irrigate the same and raise thereon crops of grain, grass and vegetables, appropriated, took and diverted from the channel of said Milk River, by means of canals, ditches and waterways, additional large amounts of the waters of said Milk River, to wit, a flow of ten thousand miners

inches of the waters of said river, and by means of canals, ditches and waterways conducted the water of said river, so taken and diverted from the said river as aforesaid, from the channel of said river to and upon divers and extensive tracts of land upon said reservation aggregating in amount about thirty thousand acres of land, and after so conducting said waters to and upon said lands used the same for irrigation of said lands, and for domestic and other useful purposes, and by means thereof raised upon said lands crops of grain, grass and vegetables.

That ever since the said year 1889, and down to the time of the commission of the wrongs and grievances committed by the said defendants as hereinafter set out and complained of, your orator and its officers and agents residing at said agency, have constantly and uninterruptedly used and enjoyed the said waters of said Milk River so taken and diverted as aforesaid in the year 1889, at and upon said agency for domestic, culinary and household purposes, and for the irrigation of the lands and premises adjacent to and connected with said agency, and for raising upon said premises crops of grain, grass and vegetables, and ever since the said year 1898, and down to the time of the commission of the wrongs and grievances by the said defendants hereinafter set out and complained of, your orator and its officers and agents and the said Indians residing upon the said reservation as aforesaid, have continuously and uninterruptedly used and enjoyed the said waters of said Milk River so appropriated, taken and diverted as

aforesaid, on the 5th day of July, 1898, upon said lands embraced within said reservation for irrigating, domestic and other useful purposes, and by means of said waters so taken and diverted from said Milk River, and used by your orator and the said Indians residing thereon as aforesaid, have raised upon said lands crops of grain, grass and vegetables and carried on agricultural pursuits, and your orator has been enabled by means thereof to train, encourage and accustom large numbers of the Indians residing upon the said reservation to habits of industry and to promote their civilization and improvement.

Seventh.

And your orator further showeth unto your Honors that large tracts of lands within said Fort Belknap Indian Reservation, being and situate along and contiguous to the channel of said Milk River, are used by your orator from year to year for the pasturing, feeding, raising, and grazing of livestock, principally horses and cattle, the property of your orator and said Indians residing upon said reservation. That in order to enable your orator and said Indians to successfully and properly pasture and feed said horses and cattle upon said lands, it is necessary and essential that the waters of said Milk River should be permitted to flow down the channel of said river, to supply and furnish said stock with drinking water. That unless the waters of said river are permitted to flow down the channel of said river, the said cattle and horses, so pasturing and feeding upon said lands, will be deprived of water neces-

sary for drinking purposes, and will render valueless for grazing, feeding and ranging purposes large tracts of lands within said reservation, situate along and contiguous to the channel of said Milk River.

Eighth.

And your orator further showeth unto your Honors that all of the waters heretofore so taken, appropriated and diverted from the channel of said Milk River as aforesaid, are essential and necessary for the use of your orator at the agency on said Fort Belknap Indian Reservation for household, domestic and culinary purposes, and for the purpose of irrigation of the tracts of land adjacent to and connected with said agency, and are essential and necessary for the proper irrigation and reclamation of the lands and premises upon said reservation for the cultivation of which said waters were appropriated, taken and diverted. That in order to enable your orator to maintain said agency, and in order to promote the civilization and improvement of the said bands and tribes of Indians upon said reservation and the encouragement of habits of industry and thrift among them, and in order to make all of the said lands within the said reservation which are adapted and suitable for farming and ranching and the pursuits of agriculture susceptible of cultivation and productive for the raising thereon of crops of grain, grass and vegetables, large quantities of water flowing in said Milk River will be required and necessary for the purpose of irrigation of the said lands within said

reservation and the reclamation of said lands. That for the purpose of subserving and accomplishing the ends and purposes for which said reservation was created, and in order to subserve the best interest of your orator and of the Indians residing upon said reservation, and the best interest of your orator in furthering and advancing the civilization and improvement of said Indians, and to encourage habits of industry and thrift among them, and to induce and enable said Indians to engage in and carry on the pursuits of agriculture and stock-raising as aforesaid, it is essential and necessary that all of the waters of said Milk River should be permitted to flow down the channel of said river, uninterruptedly and undiminished in quantity, and undeteriorated in quality.

Ninth.

And your orator further showeth unto your Honors, that notwithstanding the riparian and other rights of your orator and of the said Indians to the uninterrupted flow of all of the waters of said Milk River, as aforesaid, down the natural channel of said river, the said defendants, heretofore, to wit, in the year 1900, wrongfully and unlawfully, and without the license, consent or approval and against the wishes of your orator and of the said Indians, and without the license, consent or approval and against the wishes of the Secretary of the Interior of the said United States, and in utter disregard of the rights of your orator and the Indians residing upon the said Fort Belknap Reservation, en-

tered upon the said Milk River and its tributaries above the points of diversion of the said waters of said river by your orator and said Indians, as aforesaid, and above the places of use of said waters by your orator and said Indians, and built, erected, and constructed in and across the channel of said Milk River and its tributaries large and substantial dams and reservoirs and by means of said dams and reservoirs impeded, obstructed and prevented the waters of said Milk River and its tributaries from flowing down the natural channel of said river to the places of your orator's points of diversion and use of the said waters of the said river. That by means of said dams and reservoirs and by means of canals, ditches and water-ways, made and constructed wrongfully and unlawfully and without the license, consent, or approval of the Secretary of the Interior, over and through the public lands of your orator, by the said defendants, said defendants appropriated, took, and diverted all of the waters of the said Milk River and its tributaries out of and away from the channel of said river and its tributaries and by means of said canals, ditches, and water-ways, conducted and conveyed the same long distances away from the channel of said Milk River and its tributaries and away from the said Fort Belknap Indian Reservation. That by means of said dams and reservoirs and said canals, ditches and water-ways said defendants prevent any of the waters of said Milk River and its tributaries from flowing down the channel of said river to your orator's points of diversion and places of use

of said waters, and wholly deprived your orator and the Indians residing upon said reservation of the use of the waters of said river, all of which said acting and doings as aforesaid, of the said defendants was without the license, consent or approval of your orator, the said United States, and without the license, consent or approval of the Secretary of the Interior of the said United States.

Tenth.

And your orator further charges and says that ever since the said year 1900, the said defendants have been and are now, wrongfully and unlawfully and without right or authority, maintaining said dams and reservoirs, and have been and are now, by means of said canals, ditches, and water-ways, wrongfully and unlawfully, and without right or authority, appropriating, taking, and diverting all of the waters of said Milk River and its tributaries out of and away from the channel of said river, and ever since said year 1900, have been, and now are, wrongfully and unlawfully, and without right or authority, conducting and conveying the said waters of said river and its tributaries by means of said canals, ditches and water-ways, over and through the public lands of your orator long distances away from the channel of said river and from the said Indian Reservation, thereby impeding, obstructing, and preventing the waters of said river from flowing down the natural channel of said river to your orator's said points of diversion and places of use, and ever since the said year 1900, have been, and are now,

wrongfully and unlawfully, depriving your orator and the said Indians, residing upon the said Fort Belknap Indian Reservation, of the use of the said waters of said river and its tributaries for irrigating, stock-raising, domestic and all other useful purposes, all of which acting and doings of the said defendants was and is without the license, consent, or approval of your orator, and without the license, consent, or approval of the Secretary of the Interior, and in utter disregard and contempt of the rights of your orator in the premises.

Eleventh.

That the said defendants impede, obstruct, and prevent the flow of the waters of said Milk River down the channel of said river, as aforesaid, and take and divert the waters of said river and its tributaries from the natural channel of said river and its tributaries as aforesaid, and said defendants intend, and threaten to continue and will continue to do so, to the great and irreparable damage and injury of your orator, unless, the said defendants are restrained and enjoined from so doing by the order and decree of this Court. That your orator has no plain, speedy, and adequate remedy at law, and that unless the said defendants are restrained and enjoined from in any manner impeding, obstructing or preventing the waters of said Milk River from flowing down the channel of said river down to the places of your orator's use of said waters, your orator will suffer great and irreparable injury.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end therefore that

the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, and direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived.

May it please the Court to grant to your orator a writ of injunction, issued out of and under the seal of this court, directed to the said defendants, Mose Anderson, Henry Winters, Louden Minough, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, perpetually and forever enjoining and restraining said defendants, and each of them, and their attorneys, officers, agents, servants, and employees, and all persons whomsoever, acting by, through, or under said defendants, or any or either of them, from in any manner constructing, erecting, keeping up, or maintaining any dams or reservoirs of any kind or character in or across the channel of said Milk River or its tributaries and from in any manner impeding, obstructing or preventing the waters of said Milk River or its tributaries from flowing down the channel of said river down to your orator's places of use, and

perpetually and forever enjoining and restraining said defendants, and each of them, their attorneys, agents, servants, and employees, and all persons acting by, through, or under them or any or either of them, from in any manner interfering with the flow of the waters of said Milk River or its tributaries and taking and conducting the same from and out of the channel of said river or its tributaries and that a temporary restraining order and injunction may issue, enjoining the said defendants and each of them, and all persons acting by, through, or under them, or any or either of them, from the commission of any of the acts herein complained of during the pendency of this suit.

May it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena directed to the said defendants, Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, Cook's Irrigation Company, and Empire Cattle Company, therein and thereby commanding them and each of them, on a day certain, to appear and answer unto this bill of complaint, but not under oath, an answer under oath being expressly waived, and then and there to abide and perform such order and decree as the Court shall make in the premises, and as shall

be agreeable to equity and good conscience, and in accordance with the rules and practice of this court.

CARL RASCH,

United States Attorney and of Counsel for Complainant.

United States of America, }
 District of Montana. } ss.

Carl Rasch, being first duly sworn, deposes and says: That he is the regularly appointed, qualified and acting United States Attorney in and for the District of Montana, that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

CARL RASCH.

Subscribed and sworn to before me this 26th day of June, A. D. 1905.

[Seal]

GEO. W. SPROULE,

Clerk United States Circuit Court, District of Montana.

[Endorsed]: Filed and entered June 26, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of June, A. D. 1905, an order to show cause was duly issued herein, which said order to show cause is in words and figures as follows, to wit:

[Title of Court. Title of Cause.]

Order to Show Cause.

On reading and filing the verified bill of complaint in said above-entitled cause, upon motion of Carl Rasch, the United States Attorney for the District of Montana, and Solicitor for Complainant:

It is hereby ordered that the said defendants, Mose Anderson, Henry Winters, Loudon Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, — Corregan, W. M. Williams, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and Empire Cattle Company, a corporation, show cause, if any they have, at the courtroom of this court, in the city of Helena, State and District of Montana, on the 17th day of July, A. D. 1905, at the hour of ten o'clock in the forenoon of said day, why a general injunction during the pendency of this suit, should not be issued against each of said defendants as prayed for in said complainant's bill of complaint, a true and correct copy of which bill of complaint is hereby directed to be served upon each of said defendants, together with a copy of this order; and that

in the meantime, and until the hearing of said order to show cause, a temporary injunction and restraining order be issued against said defendants according to the prayer of said bill of complaint on file herein.

Dated, this 26th day of June, A. D. 1905.

WILLIAM H. HUNT,
Judge.

Marshal's Return.

United States of America, }
District of Montana. } ss.

I hereby certify that I received the within order to show cause on the 26th day of June, A. D. 1905, and personally served the same on the within-named Mose Anderson on June 30th, 1905, eleven miles west of Harlem; and on Henry Winters at Chinook, Montana, on June 30, 1905; on Louden Minugh, in Harlem, Montana, on June 30, 1905; on John W. Acker, 9 miles east of Chinook, on June 30, 1905; on Minnie Gannaway, 12 miles east of Harlem, Montana, on the 29th day of June, 1905; on Chris Kruse, 15 Miles west of Harlem, Montana, on the 30th day of June, 1905; on Agnes Downs, at Chinook, Montana, on the 30th day of June, 1905; on Thomas Downs, at Chinook, Montana, on the 30th day of June, 1905; on John Buckley, at Chinook, Montana, on June 30, 1905; on Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, at Chinook, Montana, on the 30th day of June, A. D. 1905; on L. Ereaux, 25 miles east of Harlem, Montana, on July 1st, 1905; on —— Corregan, at Chinook, Montana, on

June 30, 1905; on W. M. Williams, 5 miles east of Harlem, Montana, on June 29, 1905; on the Matheson Ditch Company, a corporation, by serving Matheson, one of the directors of said company, 6 miles east of Chinook, on the 30th day of June, A. D. 1905; on the Cook's Irrigation Company, a corporation, by serving James Cook, president of said company, 13 miles west of Harlem, Montana, on the 30th day of June, 1905; and on the Empire Cattle Co., a corporation, by serving A. J. Davidson, manager of said company, at Chinook, Montana, on the 30th day of June, A. D. 1905, by handling and leaving with each of them a true and correct copy thereof, together with a copy of the bill of complaint.

I further certify that I was unable to find the within-named Kit Leonard and Frank Rakita within the State and District of Montana.

Dated this 17th day of July, A. D. 1905.

C. F. LLOYD,
United States Marshal.

By Geo. E. Young,
Deputy.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule,
Clerk.

And thereafter, to wit, on the 26th day of June, A. D. 1905, a temporary restraining order was duly issued herein, which said temporary restraining order is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Temporary Restraining Order.

The President of the United States of America, to Mose Anderson, Henry Winters, Loudon Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, —— Corregan, W. M. Williams, Matheson Ditch Company, a Corporation, Cook's Irrigation Company, a Corporation, and Empire Cattle Company, a Corporation, the Defendants in said Above-entitled Cause, and Their Agents, Attorneys, Servants and Employees, Greeting:

Whereas, in the above-entitled cause a motion for the issuance of a preliminary writ of injunction has been duly made, the hearing thereof being fixed for the 17th day of July, A. D. 1905, and it having been made to appear that there is danger of great and irreparable injury being caused to said complainant, the said United States of America, and its wards, the Indians residing upon the Fort Belknap Indian Reservation in the State and District of Montana, before the hearing of said application for the writ of injunction pendente lite, unless

said defendants are, pending such hearing, restrained and enjoined as herein set forth, and an order having been made granting complainant's application for such restraining order until and pending the hearing of said application for said preliminary writ of injunction during the pendency of this suit:

Now, therefore, take notice that you Mose Anderson, Henry Winters, Louden Minugh, John W. Acker, Minnie Gannaway, Kit Leonard, Chris Kruse, Frank Rakita, Agnes Downs, Thomas Downs, John Buckley, Bertha Reser, Lydia Reser, Ezra T. Reser, Andrew H. Reser, L. Ereaux, ——— Corregan, W. M. Williams, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and Empire Cattle Company, a corporation, and each of you, and your and each of your agents, attorneys, servants and employees, and all persons acting by, through, or under you, or any or either of you, are hereby specially restrained and enjoined from taking or diverting the waters of Milk River or its tributaries from out of the channel of said Milk River or its tributaries, and from in any manner or by any means impeding, obstructing, or preventing the waters of said Milk River, or its tributaries, from flowing down the channel of said Milk River and its tributaries to the complainant's points of diversion and places of use of said waters upon the Fort Belknap Indian Reservation, and from in any manner or by any means interfering with or obstructing the free and uninterrupted use and enjoyment of the waters of said Milk River and its tributaries by the said complainant upon the Fort Belknap

Indian Reservation for culinary, domestic, and irrigation purposes until the hearing upon said application for a general writ of injunction and the further order of this Court in the premises.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of said Circuit Court, this 26th day of June, in the year of our Lord one thousand nine hundred and five, and of our Independence the one hundred and twenty-ninth.

GEO. W. SPROULE,
Clerk.

Marshal's Return.

United States of America, }
District of Montana. } ss.

I hereby certify that I received the within temporary restraining order on the 26th day of June, A. D. 1905, and personally served the same on the within named Mose Anderson on June 30, 1905, 11 miles west of Harlem; and on Henry Winters at Chinook, Montana, on June 30, 1905; on Louden Minugh, in Harlem, Montana, on June 30, 1905; on John W. Acker, 9 miles east of Chinook, on the 30th day of June, 1905; on Minnie Ganaway, 12 miles east of Harlem, Montana, on the 29th day of June, 1905; on Chris Kruse, 15 miles west of Harlem, Montana, on the 30th day of June, 1905; on Agnes Downs, at Chinook, Montana, on the 30th day of June, 1905; on Thomas Downs of Chinook, Montana, on the 30th day of June, 1905; on John Buckley, at Chinook, Montana, on June 30, 1905; on Bertha Reser, Lydia

Reser, Ezra T. Reser and Andrew H. Reser, at Chinook, Montana, on the 30th day of June, A. D. 1905; on L. Ereaux, 25 miles east of Harlem, Montana, on July 1, 1905, on ——— Corregan at Chinook, Montana, on June 30, 1905; on W. M. Williams, 5 miles east of Harlem, Montana, on June 29, 1905; on the Matheson Ditch Company, a corporation, by serving Matheson, one of the directors of said company, 6 miles east of Chinook, on the 30th day of June, 1905; on the Cook's Irrigation Company, a corporation, by serving James Cook, President of said company, 13 miles west of Harlem, Montana, on the 30th day of June, 1905; and on the Empire Cattle Company, a corporation, by serving A. J. Davidson, manager of said company, at Chinook, Montana, on the 30th day of June, 1905, by handing and leaving with each of them a true and correct copy thereof, together with a copy of the bill of complaint. I further certify that I was unable to find the within named Kit Leonard and Frank Rakita within the State and District of Montana.

Dated this 17th day of July, A. D. 1905.

C. F. LLOYD,

United States Marshal.

By Geo. E. Young,

Deputy.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Cook's Irrigation Company filed its response herein, which said response is in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Cook's Irrigation Company.

Now comes the defendant, Cook's Irrigation Company, and in response to the order to show cause why an injunction, during the pendency of this action, should not be issued herein, and reserving the right to demur, plead or answer the complaint herein, as it may be advised, respectfully shows to the Court that the injunction should not be issued, and the temporary restraining order issued herein should be dissolved, for the reasons following, to wit:

First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tort-feasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana and decisions in its courts, and the customs of the country.

Fifth. It does not appear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein.

And in opposition to the granting of said injunction, and in support of the request to dissolve the temporary restraining order, defendants present the affidavit of James N. Cook and John D. Blackstone.

Wherefore, defendants ask that the application be denied, and moved that the temporary restraining order issued herein be dissolved.

WALSH & NEWMAN and

R. E. O' KEEFE,

Attorneys for Defendants.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule,
Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant, Chris Kruse, filed his response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Chris Kruse.

Now comes the defendant, Chris Kruse, and in response to the order to show cause why an injunction, during the pendency of this action, should not be issued herein, and reserving the right to demur, plead or an-

swer the complaint herein, as he may be advised, respectfully shows to the Court, that the injunction should not be issued, and the temporary restraining order issued herein should be dissolved, for the reasons following, to wit:

First. That the bill of complaint is verified only on information and belief, and no affidavit in support of the allegations has been filed or submitted.

Second. That it does not appear that the complainant is entitled to maintain an action for and in behalf of the Indians located upon the reservation mentioned in the complaint.

Third. It does not appear that the defendants are joint tort-feasors.

Fourth. It does not appear that the defendants did not appropriate and divert waters according to the laws of the United States, the laws of the State of Montana, and decisions of its courts, and the customs of the country.

Fifth. It does not appear in the bill of complaint that the defendants are not riparian proprietors upon the said Milk River and its tributaries.

Sixth. And for other reasons appearing in the bill of complaint herein.

Seventh. That said bill of complaint does not state facts sufficient to show that the complainant is entitled to an injunction.

And in opposition to the granting of said injunction, and in support of the request to dissolve the temporary

restraining order, defendant presents the affidavits of James N. Cook and John D. Blackstone.

Wherefore, defendant asks that the application be denied, and moves that the temporary restraining order issued herein be dissolved.

WALSH & NEWMAN,
R. E. O' KEEFE,
Attorneys for Defendant.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule,
Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Empire Cattle Company filed its response herein, and affidavit of Cal. C. Shuler, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Empire Cattle Company.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana. In Equity.

Comes now the defendant the Empire Cattle Company, and in response to the order to show cause heretofore issued herein respectfully shows unto your Honors:

1. That this defendant is, and was at all the times mentioned in the bill of complaint since the 23d day of June, A. D. 1897, a corporation organized and existing under and by virtue of the laws of the State of Montana, with power and authority to acquire and own real estate and personal property.

2. That this defendant is the owner of and in possession and entitled to the possession of the north half and the southeast quarter of the southwest quarter of section thirty-three (33), township thirty-four (34) north, range nineteen (19) east; the east half of the northwest quarter; the west half of the northeast quarter; and the southeast quarter of the northeast quarter; the southeast quarter, the northeast quarter of the southwest quarter of section four (4); the northeast quarter; and the northeast quarter of the southeast quarter of section nine (9); the west half of the northwest quarter; the southwest quarter; the west half of the southeast quarter of section ten (10); the northwest quarter; the southwest quarter; the southwest quarter of the southeast quarter; and the west half of the northeast quarter of section fifteen (15); the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section twenty-two (22), all in township thirty-three (33) north of range nineteen (19) east. That the said lands are arid in character, and require a large amount of water for the purpose of irrigating same in order to successfully raise thereon crops of grain, grass and vegetables. That the title to a large portion of the said lands has been obtained from the United States Government under the laws thereof, relating to desert lands, and that the west fork of Milk River flows through the said lands and all of them.

3. That on the 13th day of January, 1899, the said Empire Cattle Company, together with W. S. Rainboldt, Josephine Rainbolt, J. S. M. Neill, Asbury Per-

kins and A. E. McFadden, appropriated 4,000 inches of the waters flowing in the West Fork of Milk River by posting at the point of diversion on said stream its notice of appropriation, stating therein the number of inches claimed, the purpose for which it was claimed, the place of intended use, and means of diversion and the size of the ditch in which it was intended to divert it, the date of appropriation and the names of the appropriators. That thereafter, within the time required by law, the said appropriators did duly cause to be filed in the office of the County Clerk and Recorder of Choteau County, Montana, in which said county the said stream was situated, a copy of the said notice of appropriation duly sworn to as required by law, which said notice was recorded in Book No. 2 of Water Rights, on page 532, records of Choteau County, Montana, to which records reference is hereby made, and a copy of which said notice so recorded is hereto attached and made a part hereof. That the said appropriators in the fall of the year 1898, acting together as an association known as the West Fork Ditch Company, constructed a dam on the West Fork of Milk River on the southeast quarter of the southwest quarter of section thirty-three (33) township thirty-four (34) North Range nineteen (19) east, and took out a ditch at that point, which said ditch was seven feet wide on the bottom and four feet deep, and constructed the said ditch so as to carry the same upon the lands of this defendant as hereinabove described. That at the time mentioned in the said notice of appropriation the waters of the said West Fork

of Milk River were by means of the said ditch and dam diverted from the said creek, and conducted through the said ditch to and upon the lands of this defendant as hereinabove set forth. That by means of the said water so diverted this defendant irrigated about seventy-five acres during the year 1899, and raised upon the said lands crops of hay and grain; that the said company has used the said waters during each and every year since the said year 1899 up to and including the year 1905; that during said period of time the said company has irrigated of said lands at least 800 acres. That this defendant company has by conveyance acquired all of the title of the said W. S. Rainbolt, Josephine Rainbolt, J. S. M. Neill, Asbury Perkins and A. E. McFadden in and to the said water right, and the right to use the waters of the said West Fork of Milk River, and the said ditch, and the defendant the Empire Cattle Company is now the owner of all the rights acquired by the said parties under and by virtue of the said appropriation. That by the use of the said waters upon the said lands the same, to the extent of at least 800 acres can be made to produce and have been made to produce during said period of time hereinabove mentioned, valuable crops of hay and grain, that without the said water for irrigation the said lands would be and remain unproductive and it would be impossible to successfully raise upon the same crops of grain, grass or vegetables.

EMPIRE CATTLE COMPANY,
By CARPENTER, DAY & CARPENTER,
Its Attorneys.

State of Montana,
County of Lewis & Clark. } ss.

A. J. Davidson, being first duly sworn, deposes and says: I am an officer of the Empire Cattle Company, the defendant corporation, to wit, its Secretary; I have read the foregoing response and know the contents thereof, and the same are true of my own knowledge.

A. J. DAVIDSON,

Subscribed and sworn to before me this 15th day of July, A. D. 1905.

[Seal]

STEPHEN CARPENTER,

Notary Public in and for said County and State.

Affidavit of Cal. C. Shuler.

State of Montana, }
County of Choteau. } ss.

Cal. C. Shuler, being first duly sworn, deposes and says: I reside near Chinook, Montana; I am and have been connected with the defendant, the Empire Cattle Company, in capacity of foreman; I have worked for the company since July 1st, 1898; I am familiar with the lands and ditches belonging to said company situated near Chinook, Montana, and have had charge of such lands and ditches since July first, 1898, and am familiar with the use made by said company of the waters flowing through the said ditches during all of said period of time. The Empire Cattle Company, together with one W. S. Rainbolt, composing what was

known as the West Fork Ditch Company, in the fall of 1898, constructed a dam in the West Fork of Milk River on the southeast quarter of the southwest quarter of section 33, township 34 north of range 19 east, which said dam was constructed of rock, brush and dirt. The said West Fork Ditch Company at the same time took out a ditch at the point in said river where the said dam was constructed and by means of said ditch and dam diverted the waters from said creek and conducted them to and upon the lands of the said Empire Cattle Company located in sections 4, 9 and 10 of township 33 north of range 19 east. The said company by means of the said water so diverted irrigated about 75 acres during the years 1899. During the year 1899 the company continued the construction of said ditch in a southeasterly direction through lands belonging to the Empire Cattle Company and W. S. Rainbolt in sections 10 and 15 of said township.

The said ditch was constructed without any unnecessary delay and by means of it the waters of said West Fork were diverted and used by the said Empire Cattle Company in irrigating its said lands and raising thereon crops of hay and grain. That said company has used the said waters during each and every year since the said year 1899 up to and including the year 1905. That during said period of time the said company has irrigated of said lands at least 800 acres. That the lands of the said company are arid in character and it is impossible to raise thereon crops of hay and grain without the use of the said water, but that

by the use thereof the said lands to the extent at least of 800 acres can be made to produce and have been made to produce during said period of time valuable crops of hay and grain.

That at the time of the filing of the complaint in this action the Empire Cattle Company was not using any of the waters in its ditches for the reason that there was not any water flowing in the said West Fork of Milk River at that time, and there had not been for a long period of time prior thereto, to wit, since the 18th day of June. That from the 18th day June until about the 4th day of July, 1905, there were no waters flowing in the said West Fork of Milk River at the head of the said company's ditch. That if the Indian Agency at Fort Belknap was unable to obtain any water from Milk River during said period of time it was not by reason of any act of the Empire Cattle Company, but because of the natural condition of said stream or the acts of some other person.

CAL. C. SHULER.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, filed their response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Andrew H. Reser et al.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Come now the defendants Bertha Reser, Lydia Reser, Ezra T. Reser and Andrew H. Reser, and in response to the order to show cause heretofore entered herein why an injunction pendente lite shall not be issued, respectfully show unto your Honors, as follows, to wit:

First. That the defendants Bertha Reser and Lydia Reser are not now using nor have they or either of them been using any of the waters of the said Milk River or any of its tributaries during the period of time during which it is alleged in the complaint subsequent to the 24th day of April, 1905, the said waters have been diverted.

Second. That on or about the 12th day of February, 1900, the said Bertha Reser and Lydia Reser being then and there each of them citizens of the United States and otherwise qualified applied to enter under the laws of the United States relative to the acquisition of title to desert lands, three hundred and twenty acres of land each situate, lying and being in section 11, 12 and 13 of

township 34 north, range 18 east, principal meridian of Montana.

That the said lands so filed upon by the defendants were then and there arid and desert lands of the United States, and were not capable of being cultivated except by the use of water thereon. That to irrigate the said lands and make the same suitable for cultivation and productive in the raising of crops of grass, grain and vegetables, the said Bertha and Lydia Reser did, on the 26th day of January, 1900, appropriate 50 cubic feet per second of the waters of the West Fork of Milk River by posting a notice of appropriation in a conspicuous place at the point of intended diversion, which said notice stated therein the number of cubic feet per second claimed, the purpose for which it was claimed, the place of intended use, the means of diversion, with the size of the ditch to be used in diverting it, the date of the appropriation, and the names of the appropriators. That the said point of diversion was at a point on the east bank of the stream marked by a dam across it 22 feet high, located about 200 yards east of the frame house belonging to said appropriators about eleven miles northwest of Chinook, Montana. That thereafter, within the time required by law the said appropriators did cause a copy of the said notice of appropriation, duly sworn to, to be filed and recorded in the office of the county clerk and recorder of the county of Chouteau, in which said county the lands herein above described were situated.

That during the year 1900, the said appropriators built a dam of dirt across the West Fork of Milk River, and constructed a levee for holding the said waters so appropriated, expending upon the said structure about the sum of \$1800, but the said dam and levy were washed out during the rainy season by floods in the said river. During the year 1901 the appropriators built a flume across the river at the point where the said dam had been, and carried it in a northerly direction to Reser Creek, a tributary of said West Fork, and conducted the waters thus appropriated to and upon the said lands herein above described, and used the said water to the extent that there were any in the said West Fork of Milk River upon the said lands until the fall of 1904. That the said waters so appropriated were used for irrigating the said land, and by means thereof the said appropriators raised upon said lands during the said years crops of grain, grass and vegetables. That about the 21st day of September, 1903, the said defendants Bertha Reser and Lydia Reser surrendered their filing upon the said desert lands, and transferred their right to the use of the water so appropriated to the defendants herein, Andrew H. Reser and Ezra T. Reser, and one Clarence B. Reser. That upon said 21st day of September, 1903, the said Andrew H. Reser, being then and there a qualified citizen of the United States, applied to enter under the desert land laws of the United States as evidenced by desert land entry, Helena Land Office No. 1196, the E. $\frac{1}{2}$, SW. $\frac{1}{4}$, section 12, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, section 13, tp. 34 N., R. 18 E. Mont.

Meridian. That the said Ezra T. Reser, being then and there a qualified resident citizen of the United States, applied to enter under the desert land laws, as evidenced by desert land entry No. 1194, Helena Land Office, the lots 3 and 4, and the W. $\frac{1}{2}$, SE. $\frac{1}{4}$, sec. 12, tp. 34 N., R. 18 E., Mont. Meridian. That at the same time the said Clarence B. Reser, being then and there a qualified citizen of the United States, applied to enter under the desert land laws as evidenced by desert land entry No. 1195, Helena Land Office, the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, the S. $\frac{1}{2}$, NE. $\frac{1}{4}$, and N. 2, SE. $\frac{1}{4}$, section 11, the SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, W. $\frac{1}{2}$, SW. $\frac{1}{4}$, of section 12, Tp. 34 N., R. 18 E., Mont. Meridian. That on or about the 24th day of April, 1905, the said Andrew H. Reser, Clarence B. Reser and Ezra T. Reser changed the point of diversion of the waters so appropriated to a point a short distance further up the stream of the said West Fork of Milk River, and duly filed the notice of the said change in place of diversion in the office of the county clerk and recorder of Choteau county, and caused the same to be recorded in Book 4 of Water Right, on page 374, records of said county, to which record reference is hereby made for a more particular description of said appropriation. That the waters so appropriated were by these defendants Andrew H. Reser and Ezra T. Reser, together with their associate Clarence B. Reser, taken out and conducted by ditches theretofore constructed to and upon the said lands, and have been used for the purpose of irrigating crops of grain, grass and vegetables during the season of 1905, and the said appro-

priators have cultivated about two hundred and forty acres of the said land during said season. That about four hundred acres of the said lands so filed upon by the said appropriators are susceptible to cultivation by irrigation, and without the use of the said water the said lands and the whole thereof would be and remain unproductive, and it would be impossible to successfully raise upon the said lands crops of grain, grass or vegetables. That these defendants and their predecessors in interest have spent large sums of money, to wit, about the sum of ——— dollars in improving said lands and in constructing dams and ditches for the diversion of the said waters and conducting the same upon the said land. That it is the intention of these defendants in good faith to so continue to cultivate the said lands as to enable them to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands. But that if the said defendants are restrained by order of this Court from using the said waters of the West Fork of Milk River it will be impossible for them to comply with the said laws, and their rights to the said land as herein above set forth will be forfeited.

Third. These defendants deny that they are diverting or appropriating any of the waters which, in the natural flow of the said Milk River would flow down to and past the lands described in the bill of complaint. That the amount of water so taken by these defendants does not exceed 300 inches and the point of diversion

is more than fifty miles distant from the point of use by the Indians as alleged in the complaint.

CARPENTER, DAY & CARPENTER,

Attorneys for Defendants Andrew H. Reser et al.

State of Montana, }
Count of Choteau. } ss.

Andrew H. Reser and Ezra T. Reser, being each first duly sworn, each deposes and says: I am one of the defendants named in the foregoing response; I have heard read the said response and know the contents thereof, and the same is true of my own knowledge.

ANDREW H. RESER.

EZRA T. RESER.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Agnes Downen, filed her response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Agnes Downen.

To the Honorable the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Comes now the defendant Agnes Downen and in response to the order to show cause heretofore entered herein, respectfully shows unto your Honors as follows, to wit:

First. That this defendant is not now using or has she ever been using any of the waters of said Milk River or any of its tributaries during the time mentioned in the said complaint, except for irrigating once about 20 inches in the spring of 1905.

Second. That she is a claimant to a tract of three hundred and twenty acres of unsurveyed public lands in Choteau county, Montana, described in and mentioned in receivers duplicate receipt No. 5866 issued from the U. S. Land Office, Helena, Montana, on July 16th, 1900, that in the year 1902 this defendant appropriated 12 cubic feet per second of the waters of the North Fork of Milk River for use upon the said lands in reclaiming the same from their arid condition, and commenced the construction of a dam and ditch for the

purpose of conducting the same to and upon the said lands; that the said dam was destroyed during the year 1903; was rebuilt by this defendant and was again destroyed in the year 1904, but has been re-built and the ditch completed so as to conduct the waters from said North Fork to and upon the said desert land; that it is the intention of this defendant in good faith to use the waters of North Fork upon the said land to the extent of ——— inches and to obtain title thereto from the United States under the laws thereof relating to the acquisition of title to desert lands; that about ——— acres of the said land so filed upon by the said appropriator is susceptible to cultivation by irrigation but without the use of the said water the said land and the whole thereof would be and remain unproductive and it would be impossible to successfully raise upon it crops of grain, grass, or vegetable. That if this defendant is restrained by order of this Court from using the said waters her rights to the said land as hereinabove set forth will be forfeited. That the amount of water so appropriated by this defendant will not in any manner affect the flow of the said Milk River past the lands described in the bill of complaint since the amount of water so to be taken by this defendant does not exceed 50 inches and the point of diversion is more than sixty miles distant from the point of use by the Indians as alleged in the complaint.

CARPENTER, DAY & CARPENTER,

Attorneys for Agnes Downen.

State of Montana, }
 County of Choteau. } ss.

Agnes Downen, being first duly sworn, deposes and says: I am one of the defendants named in the foregoing response; I have heard read the said response and know the contents thereof and the same is true of my own knowledge.

AGNES DOWEN.

Subscribed and sworn to before me this 14th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the response of defendant Matheson Ditch Company, and the affidavits of defendants John Matheson, Thomas Downen, John Prosser and John W. Acker, and of D. E. Martin and J. S. Roberts, were filed herein, being in words and figures, as follows, to wit:

[Title of Court, Title of Cause.]

Response of Matheson Ditch Company.

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit, in and for the District of Montana, in Equity.

Affidavit of John Matheson.

State of Montana,)
) ss.
 County of Choteau.)

John Matheson, being first duly sworn, deposes and says: I reside at Chinook, Montana, and am a director in the Matheson Ditch Company one of the defendants in this action and was one of the organizers of said company. In the year 1890 one M. T. Ridout was occupying a portion of the lands hereinafter described as belonging to this affiant which were then unsurveyed public lands of the United States. On the 9th day of May, 1890, M. T. Ridout, together with one J. W. Clark, appropriated certain of the waters flowing in the North Fork of Milk River for the purpose of irrigating the lands then occupied by said Clark and Ridout, and filed their notice of appropriation in the office of the county clerk and recorder of Choteau County, Montana, in which the said lands were situated, a copy of which notice of appropriation is hereto attached and made a part hereof; that in the month of December, 1890, this affiant purchased from the said Ridout his right to the possession of the said land and to the use of the said water as evidenced by a quit claim deed then given to the said affiant, which said quitclaim deed was destroyed by a flood some years ago, before the same was recorded. That this affiant took possession of the said land and in May, 1891, commenced with the said Clark to construct a ditch, tapping the said North Fork of Milk River on its

south side some little distance east of the present ditch known as the Matheson Ditch, which said ditch was at that time eight feet wide by four feet deep. That the said ditch was completed during the year 1891 to the lands of this affiant. That in the winter of 1891 and 1892 affiant put in a dam in the said North Fork of Milk River about eleven feet high, and in April, 1892, the water by means of said dam and ditch was taken out from the said North Fork and used upon the lands of this affiant and said Clark for the purposes of irrigation and there was irrigated during that year about one-half section of the lands of this affiant and about one-quarter section of the lands belonging to Clark. The waters were continuously used through said ditch during the years 1892, 1893, 1894 and 1895, upon the lands belonging to and occupied by this affiant and the said John W. Clark and practically the entire area of said lands were irrigated and crops of hay, grain and vegetables were grown thereon during said years. That during the said years the dams in said river were washed out a number of times, and in order to obtain a better location this affiant and the said John W. Clark changed the point of diversion of the said waters to a point on the southwest bank of the said stream about fifteen rods east of the southeast corner of the northwest quarter of the northwest quarter of section 29, Tp. 33 N., range 20 east, being the point at which the present Matheson Ditch taps the said North Fork. That on the said 19th day of September, 1895, this affiant and John W. Clark associated with themselves one James Davis and appro-

riated about five thousand inches of the waters of the said North Fork by posting a notice as required by law at the point of the intended diversion and thereafter filing for record in the office of the county clerk and recorder of Choteau County, the county in which said stream is located a copy of said notice duly sworn to as required by law, a copy of which said notice so filed for record and recorded in book two of water rights on page 442, records of Choteau County, is hereto attached and made a part hereof. That during the year 1895 the said parties put in a dam at the said point of diversion as described in said notice, and constructed a ditch which at its head was twelve feet wide by eight feet deep, leading from the point of diversion about three-quarters of a mile in a southeasterly direction until it intersected the old ditch. The dam was located in the river about forty rods below the head of the ditch and was completed in the fall of 1895 and the head gate put in. The waters of the said North Fork were used continuously during the years 1896, 1897, 1898, through the said ditch upon the lands of this affiant hereinafter described and upon the lands of the said Clark which had been sold in 1896 to Henry Bosch and upon the lands of John Prosser, Thomas Downen and John Acher, and H. M. Burrus, as set forth in the affidavits of said parties on file herein. In the spring of the year 1899 in order to properly maintain the said ditch and to defray the costs of repairs and maintenance this affiant and Thomas Downen, Charles G. Acher and H. M. Burrus, each and all of whom were users of water through the said ditch, associated them-

selves together and formed a corporation known as the Matheson Ditch Company, a copy of the articles of incorporation of which are hereto attached and made a part hereof, the principal business of which said corporation was to maintain and keep in repair the said ditch hereinabove described to be known as the Matheson North Fork Ditch and Dam across said river. At the time of its organization the stock of said company was issued to the stockholders in the proportion in which each owned water running in the said ditch, and was divided as follows: John Matheson, 56 shares; H. M. Burrus, 15 shares; Thomas Downen, 20 shares; John R. Prosser, 10 shares; Henry Bosch, 10 shares; John Acher, 5 shares, and the cost of maintaining and constructing the said ditch was borne by the said shareholders in the proportion which their respective shares bore to the whole issue outstanding. The said Matheson Ditch Company does not now and has not at any of the times mentioned in the complaint diverted or claimed to divert any of the waters of the said stream nor does the said ditch company own or claim to own any of the waters running in the said stream. The company owns and operates the said ditch for the benefit of its shareholders owning water rights entitling them to the use of the waters of the said North Fork in the proportion that their respective shares bear to each other and to the whole amount of shares of said company outstanding. That this affiant is the owner of about six hundred acres of land lying under the said ditch and during all the time since the organization of said company this

affiant has used through the said ditch the waters of the North Fork heretofore appropriated by him to the extent at least of three hundred inches each and every year during said period of time. And the other shareholders in the said company have used through the said ditch during each of said years, of waters of the said North Fork theretofore appropriated by them or their predecessors in interest to the extent of the shares held by them in the said company and have borne the expense of the maintenance of the said ditch in the proportion that the shares held bore to the number of shares outstanding.

JOHN MATHESON.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

Affidavit of Thomas Downen.

State of Montana, }
County of Choteau. } ss.

Thomas Downen, being first duly sworn, deposes and says: I am one of the defendants in this action; I reside near Chinook, Montana. I, together with the defendant, John Buckley, am and have been since the year 1895 the owner and in possession of the SE. 1/4 SE. 1/4 of section 26, E. 1/2 NE. 1/4, NW. 1/4 NE. 1/4 of section 35 and the N. 1/2 section 36, Tp. 33 N., R. 20 E. contain-

ing about 480 acres. We acquired our title to said lands by purchase from Alex Buckingham in the month of May, 1895; Buckingham had merely a squatter's right to the land and relinquished his right in favor of John Buckley and myself and we obtained title thereto from the United States under the Homestead Laws. Sometime during the year 1893 one W. E. Fisher had built a ditch, tapping the North Fork of Milk River on its southeast bank near its mouth and appropriated about six hundred and forty inches of the waters of said North Fork of Milk River. Alex Buckingham, on May the 12th, 1895, appropriated 300 inches of waters of the said North Fork to be used upon the lands hereinabove described and to be taken out of the said North Fork by means of the said Fisher ditch, the right to use which Buckingham had acquired from Fisher. Upon the purchase of said Buckingham's rights by affiant and his co-defendant, John Buckley, they conducted about 300 inches of the waters of said North Fork through the said Fisher ditch to and upon the lands hereinabove described, and during the years 1896, 1897, 1898, they used the said waters through the said Fisher ditch upon the said lands, irrigating at least 100 acres thereof and growing crops of hay thereon. That in the year 1899 affiant purchased from one James Davis, an interest in a ditch which had theretofore been constructed by John Matheson, James Davis and John W. Clark, known as the Matheson Ditch, which tapped the North Fork of Milk River about three miles above the point of diversion by the Fisher Ditch and affiant and his codefendant,

John Buckley, acquired by said purchase the right to flow through the said Matheson ditch 200 inches of the waters of said North Fork of Milk River, and constructed a ditch tapping the Matheson ditch near the point where it crosses the line of the Great Northern Railroad Company and conducted the water from that point down to and upon the lands hereinabove described using the ditch known as the Fisher ditch for a portion of said lands and other ditches constructed by this affiant and Buckley for the rest of it. That in the month of April, 1899, this affiant, together with John Matheson, Charles G. Acher and H. M. Burrus organized and caused to be incorporated the Matheson Ditch Company for the purpose of maintaining the said Matheson Ditch and conducting the waters of the said North Fork belonging to this affiant and his associates to their said lands. This affiant and his codefendant, John Buckley, owning twenty shares of the capital stock of said company and being thereby entitled to use the said ditch to the extent of 200 inches. That during each and every year since and including 1899, up to and including the year 1905, this affiant and his codefendant, John Buckley, have used the waters of said North Fork through the said Matheson ditch to the extent of at least 200 inches and have irrigated about 300 acres of said land, and raised thereon crops of hay, grain and vegetables. That the said lands hereinabove described are arid in character and require large quantities of water for the purpose of irrigating the same in order to make them productive and successfully raise thereon crops of grain,

grass and vegetables, and that at least 200 inches of the waters of said North Fork are required for the irrigation of the lands heretofore cultivated by this affiant and his associate John Buckley.

Affiant further states that he and the said Buckley are not the absolute owner of the N. 1/2 of section 36 in said township, but that the said lands are a part of the public school lands of the State of Montana, and affiant and his associate hold and have held the possession and right to use the said land during the past nine years, by lease from the State of Montana.

THOMAS DOWEN.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

Affidavit of John Prosser.

State of Montana, }
County of Choteau. } ss.

John Prosser, being first duly sworn, deposes and says: I am near Chinook, Montana; I, together with Celia A. Gelder, am the owner of and in possession of the N. 1/2, NW. 1/4 and the SW. NW. 1/4, section 35, Tp. 33 N., R. 20 E. In the year 1895 I purchased from James Davis by bill of sale, the right to use 200 inches of the waters of North Fork of Milk River through a ditch then being constructed by Davis, together with Clark

and Matheson, which is now known as the Matheson Ditch. In the fall of 1895 I assisted in the construction of the Matheson Ditch doing the amount of represented by my interest in the ditch as compared with the interests of the other owners. In the spring of 1896 I constructed a ditch running from the Matheson Ditch to and upon the land herein above described and used the waters of North Fork of Milk River through the said ditches upon the said land to at least the extent of 50 inches. That during the years 1896, 1897 and 1898, the waters of said North Fork were used upon said lands through the said ditches, the amount used being gradually increased each year. That in the spring of 1899 upon the organization of the Matheson Ditch Company, this affiant by reason of his ownership in said ditch and water right by purchase from said Davis became the owner of ten shares of the capital stock of the said ditch company representing the right to use 100 inches of the waters of the said North Fork through the said Matheson Ditch. That affiant in the meanwhile had sold to H. M. Burrus the right to use the remaining 100 inches of the waters so purchased by him from the said Davis and there was issued to said Burrus ten shares of the capital stock of said ditch company. That the waters of said North Fork of Milk River have been used by this affiant and Celia A. Gelder upon the lands herein above described during each and every year from said year 1899 up to and including the year 1905 to the extent of at least one hundred inches and affiant has contributed to the cost of maintenance of said ditch in the

proportion that his said shares bear to the rest of the capital stock of said company. That during each of the said years affiant and his co-owner have grown upon the said lands crops of hay, grain and vegetables, and has cultivated the same to the extent of about one hundred and twenty acres up to the present time. That the said lands are arid in character and require large quantities of water in order to make them productive and in order to successfully raise thereon crops of grain, grass and vegetables. That at least 120 acres of said land is capable of cultivation by the use of water for irrigation and that at least one hundred inches of the waters of said North Fork are required for the proper irrigation of said land and this affiant and his associate Celia A. Gelder, have used and still are using that amount of said waters.

JOHN PROSSER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

Affidavit of John W. Acher.

State of Montana, }
County of Choteau. } ss.

John W. Acher, being first duly sworn, deposes and says: I am one of the defendants in this action; I reside, near Chinook, Montana. In the year 1893, one Fred

Davis was the owner, in possession of and entitled to the possession of the NE. $\frac{1}{4}$ of section 31, Tp. 33 N., R. 21 E., Mont. Mer. That said Davis assisted in the construction of a ditch tapping the North Fork of Milk River by one W. E. Fisher and acquired by purchase from said Fisher the right to use through said ditch 200 inches of the said waters as represented by shares of stock in the Fisher Ditch Company, which said waters had theretofore been appropriated by said W. E. Fisher by means of the said ditch as represented by notice of appropriation filed on the 28th day of June, 1893, in the office of the County Clerk and Recorder of Choteau County, Montana. That by various and sundry conveyances this affiant has become the owner of the said NE. $\frac{1}{4}$ of section 31, together with the right to use the said 200 inches of water as represented by said certificate of shares in the said Fisher Ditch Company. That in the year 1896 this affiant who was then a qualified citizen of the United States took possession under the homestead laws of the United States the S. $\frac{1}{2}$, NE. and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 32, Tp. 33 N. of R. 21 E., Mont. Mer., and has since acquired the full title to said land by patent from the United States. That on or about the said year 1896 this affiant purchased from one John Matheson the right to use 50 inches of water of the North Fork of Milk River appropriated and diverted by the said Matheson and others through the ditch known as the Matheson Ditch, which said right is represented by a certificate for five shares of stock in the Matheson Ditch Company issued to Acher Brothers but

which is in reality the property of this affiant. That on or about the 4th day of January, 1901, this affiant, who was then and there a qualified citizen of the United States applied to enter under the Desert Land Laws of the United States the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 33, Tp. 33 N. of R. 21 E., and this affiant is now in possession of the same claiming the right to occupy the same under the said Desert Land Laws. That the said Davis and the predecessors in interest of the affiant during each and every year from the year 1893 down to the year 1901 when the claim was acquired by this affiant, used the waters of the said North Fork of Milk River through the said Fisher and Matheson Ditches to at least the extent of 200 inches and that this affiant from the year 1896 up to the year 1901 has used the said 50 inches of water so purchased from the said John Matheson through the said Matheson Ditch upon the lands belonging to this affiant and that since the said year 1901, this affiant has used the said waters through the said Matheson and Fisher ditches upon his said land to the extent of at least 200 inches. That there has been cultivated upon the said section 31 and 32 and 33 at least 280 acres of land and that that amount is susceptible to cultivation by the use of water thereon and the use of said water is necessary for the successful growing of crops of hay, grain and vegetables. That during the period of time the said land has been occupied by this affiant he has successfully grown from the said land by the use of the said waters valuable crops of hay, grain and vegetables and

at the present time there are about 280 acres of the said lands which have been irrigated by this affiant.

JOHN W. ACHER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

Affidavit of D. E. Martin.

State of Montana, }
County of Choteau. } ss.

D. E. Martin, being first duly sworn, deposes and says: I am a farmer by occupation; I reside about three and a quarter miles east of Chinook, Montana, and have resided there since 1891; I have known Mr. John Matheson since the year 1890, in the year 1890 Mr. Matheson purchased a tract of land in section 28, Tp. 33 N. of R. 20 E., Mont. Mer., from one M. T. Ridout and others and moved upon the land where he now lives and where he has lived during all these years since that date, in the spring of the year 1891, Mr. Matheson together with John Clark took out the waters of the North Fork of Milk River by means of a dam located on section 28 and a ditch taken out from the south side of the said North Fork and completed the ditch to and upon the land of the said Matheson during the year of 1891. He used the waters through the said ditch upon a considerable portion of his land during the years 1892, 1893, 1894 and

1895. And in the year of 1895 he, together with one Clark and Davis, constructed a new ditch extending from the southwest bank of the said North Fork to and upon his land and he together with others has used the waters of said North Fork of Milk River during each and every year since the said year 1895, and up to and including the year 1905.

D. E. MARTIN.

Subscribed and sworn to before me this 11th day of July, A. D. 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

Affidavit of J. S. Roberts.

State of Montana, }
County of Choteau. } ss.

J. S. Roberts, being first duly sworn, deposes and says: I am a farmer by occupation; I reside about six miles east of Chinook, Montana, and have resided there about five years; I have known Mr. John Matheson since the spring of the year 1891. At that time he was living on section 28, Tp. 33 N. of R. 20 E., Mont. Mer., where he now lives. During that year he together with one John Clark built a dam on said section 28 in the North Fork of Milk River and constructed a ditch extending from the south side of the said North Fork to and upon the land of the said Matheson, and by means of said dam and ditch took out the waters of the said North

Fork and conducted them upon his said land. He used the water through the said ditch upon a large part of his land during the years 1892, 1893, 1894, 1895, using the water upon between two and three hundred acres of land. In the year 1895 he and Clark together with one Davis constructed a ditch extending from the southwest bank of the said North Fork at a different point of diversion which is a short distance up the stream and connecting with his old ditch. Through this latter ditch he and others have used the waters of said North Fork, each and every year since the year 1895. Among others who have used water through that ditch since 1895 were Thomas Downen, H. M. Burrus, John Prosser, Henry Bosch, Acher Brothers, Charles Christiansen and John Acher and Sharpless Brothers. I myself have used water through there for about five years claiming title under Mr. Matheson.

I also visited the Belknap Agency on the sixth day of July, 1905, in company with John Matheson, Junior. At that time there was sufficient water in the river to fill the river above the dam to the top of the dam. The intake of the pumping station was 18 inches under the surface of the water. The Agency uses the water at that point for irrigating about four acres of land as a garden and for supplying the Indian School for domestic purposes.

At the same time I also visited the dam of the New Harlem Irrigation Company, which is located on Milk River below the ditches of the defendants in this action and above the ditches of the Indians. At that time

none of the defendants were using any water from the Milk River or any of its tributaries. The ditches of the New Harlem Irrigation Company were running full and were taking all the waters in the stream except about 150 inches. There was but a very small flow of water over the dam of the Harlem Company. There seemed to be a small seepage flow from the dam.

J. S. ROBERTS.

Subscribed and sworn to before me this 11th day of July, 1905.

[Seal]

D. L. BLACKSTONE,

Notary Public in and for Choteau County, State of Montana.

[Endorsed]: Filed and Entered July 17, 1905, Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D. 1905, the defendant Henry Corregan filed his response herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Response of Henry Corregan,

To the Honorable, the Judges of the Circuit Court of the United States, of the Ninth Circuit in and for the District of Montana, in Equity.

Comes now the defendant Henry Corregan and in response to the order to show cause heretofore entered herein respectfully shows unto your Honors as follows, to wit:

First. That this defendant is now and has been ever since the 26th day of September, 1901, in the possession of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$, NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ and S. $\frac{1}{2}$, SE. $\frac{1}{4}$ of section 6, and the NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of section 7, Tp. 36 N., R. 18 E., Mont. Mer., of the unsurveyed public lands of the United States claiming the right to occupy the same under and by virtue of desert land entry No. 6986, Helena, Montana, Land Office.

Second. That for the purpose of reclaiming the said lands the defendant with one Sarah Corregan, did on the 12th day of October, 1901, appropriate 20 cubic feet per second of the waters of the North Fork of Milk River, by posting a notice of appropriation in a conspicuous place at the point of diversion, stating therein the number of inches claimed, purpose for which it was claimed, the place of intended use, the means of diversion with the size of the ditch, the date of appropriation and the names of the appropriators. That within the time required by law this defendant filed for record in the office of the county clerk and recorder of Choteau County, in which county said stream was situated a copy of the said notice of appropriation duly sworn to according to law, a copy of which said notice is hereto attached and made a part hereof.

Third. That immediately thereafter this defendant commenced the construction of said ditch and completed the same with reasonable diligence and during the year 1902 constructed about $2\frac{1}{4}$ miles of said ditch and diverted the waters from said stream and conducted

them to and upon the lands of this defendant herein above described to at least the extent of one hundred inches. That during each of the years 1902, 1903, 1904 and 1905, this defendant has used the said waters to the extent of 100 inches upon his said lands and has grown thereon valuable crops of hay and grain; that it is his intention in good faith to use the said waters upon the said lands and to obtain title thereto from the United States under the laws thereof relating to desert land. That if this defendant is restrained by order of this Court from using said waters his right to the said land as herein above set forth will be forfeited. That the amount of water so used by this defendant does not in any manner affect the flow of the said Milk River past the lands described in the bill of complaint since the amount of water so taken by this defendant does not exceed 100 inches, and the point of diversion is more than ninety miles distant from the point of use by the Indians as alleged in the bill of complaint.

CARPENTER, DAY & CARPENTER,
Attorneys for Henry Corregan.

State of Montana, }
County of Choteau. } ss.

Henry Corregan, being first duly sworn, deposes and says: I am the defendant named in the foregoing response; I have heard read the said response and know the contents thereof, and the same is true of my own knowledge.

HENRY CORREGAN.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of
Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo.
W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D.
1905, the defendant Henry Winter, filed his response
herein, being in words and figures as follows, to wit:
[Title of Court, Title of Cause.]

Response of Henry Winter.

To the Honorable, the Judges of the Circuit Court of
the United States, of the Ninth Circuit, in and for
the District of Montana, in Equity.

Comes now the defendant Henry Winter, and respectfully shows unto your Honors that on or about the 18th day of March, 1896, one Perry E. Wyncoop, was and had been for a long time prior thereto the owner and in possession of the N. $\frac{1}{2}$ of section 5 in Tp. 32, N. of R. 21 E., Mont. Mer., and that one Julia H. Wyncoop was and had been for a long time prior thereto the owner of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 31, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 32 in Tp. 33 N., of R. 21 E., Mont. Mer. That on or about said date the said Perry E. Wyncoop did appropriate 320 inches of the waters of Milk River, and the said Julia H. Wyncoop did then and there appropriate 160 inches of the waters of Milk

River by posting a notice of appropriation at the point of intended diversion as required by law, which said notice stated the number of inches claimed, the purpose for which they were claimed, the place of intended use, the means of diversion with the size of the ditch, the date of the appropriation, and the names of the appropriators. That thereafter within the time required by law the said Perry E. Wyncoop and Julia H. Wyncoop did file for record in the office of the county clerk and recorder of Choteau County, in which said county the said water rights were located a copy of the said notice of appropriation duly sworn to as required by law, a copy of which said notice is hereto attached and made a part hereof. That thereafter during said year 1896, the said Perry E. Wyncoop and Julia H. Wyncoop did, by means of the said Paradise Ditch, divert the waters from the said Milk River, and conduct the same to and upon the above-described land, and used the same thereon for the purposes of irrigating the said land and growing thereof crops of hay and grain.

That on or about the 20th day of September, 1896, the said Perry E. Wyncoop and Julia H. Wyncoop, by deed of conveyance duly executed and acknowledged, did convey the said land and water rights to this defendant, who continued so to divert the said waters through the said Paradise Ditch until the year 1900. That on or about the 10th day of October, 1900, this defendant, together with one Moses Anderson, changed the point of diversion of the said water to a point on the

right bank of the said Milk River about eighty rods in a southwesterly direction from the SE. corner of section 36 in said township 33 N. of R. 19 E., and by means of a ditch 10 feet wide by two feet deep did divert from said Milk River about 100 cubic feet per second of the waters thereof. That since the year 1898 the defendant has also been the owner and in possession of the S. $\frac{1}{2}$, NW. $\frac{1}{4}$, and lots 2 and 3 of section 4, and lot 1 of section 5, in Tp. 32, N. of R. 21 E. That during each of the said years since the year 1900 the defendant has diverted the waters of the said Milk River through the said ditch last herein above mentioned and conducted them to and upon all of the lands herein above described belonging to this defendant, and has irrigated the same to the extent of about six hundred acres, and has grown thereon each year since the year 1896 valuable crops of hay and grain. That all of the said lands are arid in character, and in order to make the same productive and to successfully raise thereon crops of grain, grass and vegetables, a large amount of water is necessary, to wit, at least 480 inches. That without the use of the said waters on said lands, the same would be and remain unproductive, and it would be impossible to successfully raise thereon crops of grain, grass and vegetables. That at the time of changing the said point of diversion of the said waters this defendant, together with one Mose Anderson, did duly file for record in the office of the county clerk and recorder of said county of Choteau, in which county the said stream is situated, his notice of appropriation of said waters, duly

sworn to, a copy of which is hereto attached and made a part hereof.

CARPENTER, DAY & CARPENTER,
Attorneys for Henry Winter.

State of Montana, }
County of Choteau. } ss.

Henry Winter, being first duly sworn, deposes and says: I am the defendant named in the foregoing response; I have read the same and know the contents thereof and the facts therein stated are true of my own knowledge.

HENRY WINTER.

Subscribed and sworn to before me this 12th day of July, A. D. 1905.

[Seal] D. L. BLACKSTONE,
Notary Public in and for Choteau County, State of Montana.

[Endorsed]: Filed and entered July 17, 1905. Geo. W. Sproule, Clerk.

the valley and watershed of said stream, and that said lands are arid, riparian, agricultural lands, and will not produce crops unless they are irrigated, and when said lands are irrigated, they are productive, and produce large crops of hay, grain and other farm products.

That the said stockholders, and each of them, or their predecessors in interest, during the years 1895 and 1896, and most of them during the year 1895, for the purpose of irrigating and rendering productive the lands held by them respectively, and for household and other domestic uses, and under and by virtue of the laws of the United States, the laws of the State of Montana, and the decisions of its courts, and the rules and customs of the country, appropriated and diverted from the North Fork of said Milk River an amount of water sufficient to irrigate their said lands respectively, owned and occupied by them, and conveyed the same through the ditch, hereinafter mentioned, and through laterals radiating therefrom, to, over and upon their said lands respectively, and used the same for irrigating said lands and producing hay, grain and other crops thereon, and for household and other domestic purposes, and in all things complied with the laws of the United States, the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country relating to diverting and appropriating water for beneficial purposes.

That the said North Fork of Milk River is a non-navigable stream, and at the time the said waters were so diverted, appropriated and conveyed, the lands along

the banks of said stream, above the point of said diversion, were unappropriated public lands.

That the said stockholders are not parties to this suit other than as they are interested as stockholders of the defendant Cook's Irrigation Company.

That the said stockholders, or their predecessors in interest, relying upon the land laws of the United States, and the rights granted to appropriators of water, for the purpose of reclaiming desert lands, made entries, under the land laws of the United States, of the lands held by them respectively, and diverted and appropriated the waters of said North Fork of said Milk River, as aforesaid.

That the said lands, owned and occupied by the said defendants and its stockholders, are so situated that the said waters can be more economically conveyed to the same through one ditch, and then distributed to the several tracts by laterals connecting therewith, and for the more economical use of the said water, and the construction of a ditch for conveying the same to said lands, the said stockholders organized the corporation of Cook's Irrigation Company, for the purpose of constructing and maintaining an irrigation ditch to reclaim and irrigate the lands of the said stockholders so occupied by them; the rights of the said stockholders being determined by the amount of water appropriated by them, and the amount of stock of said corporation owned by them respectively.

That the said defendant, Cook's Irrigation Company, and its stockholders, who are citizens of the United

States, as aforesaid, acting under the laws of the United States, and the laws of the State of Montana, the decisions of its courts, and the rules and customs of the country, and for the purpose of conveying water to, over and upon their said lands, for the purpose of reclaiming the same, constructed an irrigation ditch, tapping the waters of said North Fork of Milk River, and expended thereon in labor and money the sum of over twenty thousand dollars (\$20,000.00), and which ditch is eighteen feet wide, two and one-half feet deep, and ten miles long, with an average fall of twelve inches per mile, and with numerous laterals leading therefrom to the different tracts of land, owned by the said stockholders.

That the construction of said ditch was commenced on or about the first day of October, 1895, and work thereon was prosecuted with reasonable diligence until the same was completed, and the same was used for conveying water to irrigate said lands, commencing with the year 1896, and has been used continuously since that time, and for the purposes aforesaid, by this defendant and its said stockholders.

That this defendant and its said stockholders have heretofore irrigated from said ditch in the aggregate about three thousand (3,000) acres of land, and that the said ditch and its laterals will cover and irrigate over five thousand (5,000) acres of land, and the said stockholders are extending their works of irrigation and reclaiming the lands covered by said ditch and its laterals.

That the amount of water of said stream, appropri-

ated by the said defendant and its stockholders, as aforesaid, and conveyed through said ditch and its laterals, and used for the purpose of irrigating said lands and other purposes, as aforesaid, exceed fifty (50) cubic feet per second, and two thousand (2,000) miner's inches, and the said use of said waters is a reasonable use thereof.

That by reason of the said appropriations and diversion of said waters, a large area of lands have been reclaimed and made productive, and lands theretofore unoccupied and unproductive were settled upon and improved, and homes established thereon, and large amounts were expended for building residences, barns and other outbuildings, and building fences, constructing roads, bridges and other improvements, exceeding in all more than one hundred thousand dollars (\$100,000.00).

That if the said defendant, Cook's Irrigation Company, is enjoined from conveying said water, through its said ditch, for the use of said stockholders, the said defendant, and its stockholders, will be greatly and irreparably damaged, and the said lands will be greatly depreciated in value, and a large portion thereof must be abandoned as homes, and the said defendant's ditch will be rendered worthless; and unless the temporary restraining order herein is dissolved, or so modified that the said defendant may convey said water for the use of its stockholders, within a period of five days, large areas of their hay and grain will be ruined, to their great and irreparable damage.

That by reason of said ditch, so constructed by the defendant, Cook's Irrigation Company, and ditches constructed by other persons, conveying water from said Milk River and its tributaries, the waters of said stream, at flood time, have been distributed over the lands, and gradually seeped back into the stream, and the flow of said stream was thereby made more uniform and continued in a larger volume during the dry season than it was prior to the time the said irrigation works were constructed and the waters of said stream so used; that before the said irrigation works were constructed and the said waters so used, the said Milk River was accustomed to going dry during the late summer and fall.

That since the injunction was issued herein, the flow of water in said stream has been far in excess of the needs of the complainant herein, and a large amount of water is flowing past the said reservation.

That prior to the time the said ditch was constructed and the said waters appropriated, diverted and used, as aforesaid, there was no appropriation of water made upon the said Indian Reservation, for agricultural or other purposes, excepting a small pumping plant, which was used for pumping water for use for domestic purposes, and to irrigate not to exceed eight acres of land; that said pumping plant, since the said ditch was constructed and the appropriation made as aforesaid, has been greatly enlarged, and the said plant now consists of an engine, having a cylinder nine and one-half inches inside diameter, with twelve inch stroke, at ninety pounds pressure, running at one hundred and fifty revo-

lutions per minute, and raising water sixteen feet, and part of it fifty feet, to a tank to be used for culinary purposes. That said pumping plant is not being run continuously, and the said lands so irrigated do not require to exceed one acre foot per acre of water during the entire year, and that not more than three hundred people are supplied at the said Indian Agency with water for domestic and culinary purposes.

That there are springs and other streams upon the said reservation sufficient to supply stock pastured thereon, and that the stock pastured upon said reservation seldom go to the said Milk River to drink.

That the said appropriation, mentioned in the complaint, claimed to have been made by the complainant, in the year 1898, is through a ditch about eighteen feet wide, two and one-half feet deep, with a fall of about nine inches to the mile, and, according to deponent's best information and belief, the said ditch has not any branches or laterals, excepting one, and only a small amount of land is irrigated thereby, and only a small amount of water is applied to any beneficial use or purpose.

That the said Milk River, above the said reservation, is fed by numerous tributaries, and that long since the canal was constructed by the Cook's Irrigation Company, and the said water appropriated, diverted and used, as hereinbefore set forth, divers and sundry persons and corporations have, on the said tributaries and on the main stream of said Milk River, constructed dams and ditches, and diverted, appropriated and conveyed,

and still continue to divert, appropriate and convey large quantities of said waters of said tributaries and said Milk River, in excess of fifteen thousand (15,000) inches, and thereby prevent the same from flowing down said stream, which said persons and corporations are not parties to this suit, and that a large portion of the waters flowing through the said North Fork of said Milk River, which of right belong to the said Cook's Irrigation Company, and its stockholders, and which are now permitted to flow down the said stream, on account of the injunction herein, are taken up and used by some of the said subsequent appropriators, and do not reach the said reservation.

Deponent further says, that Christ Kruse, one of the defendants in this action, is the owner and occupant of lands situated within the valley and watershed of said North Fork of Milk River, and is the owner or beneficiary of one-half share of stock in the defendant, Cook's Irrigation Company.

JAS. N. COOK.

Subscribed and sworn to before me this 17th day of July, A. D. 1905.

[Seal] JAMES A. WALSH,
Notary Public in and for Lewis and Clark County, State
of Montana.

State of Montana, }
 County of Lewis and Clark. } ss.

John D. Blackstone, being duly sworn, says that he is one of the directors of the defendant, Cook's Irrigation Company, and is acquainted with the stockholders thereof, and with the matters and things set forth in the foregoing affidavit.

That he has read the foregoing affidavit and knows the contents thereof, and the same is true of his own knowledge.

JOHN D. BLACKSTONE,

Subscribed and sworn to before me this 17th day of July, A. D. 1905.

[Seal] JAMES A. WALSH,
 Notary Public in and for Lewis and Clark County, State
 of Montana.

[Endorsed]: Filed and entered July 17th, 1905. Geo.
 W. Sproule, Clerk.

And thereafter, to wit, on the 17th day of July, A. D.
 1905, the affidavit of N. A. Sharpless was filed here-
 in, being in words and figures as follows, to wit:

Affidavit of N. A. Sharpless.

State of Montana, }
 County of Lewis and Clark. } ss.

N. A. Sharpless, being first duly sworn, deposes and says: I reside near Chinook, Montana. On July 13th,

1905, in company with one J. E. Sharpless, I visited the Fort Belknap Indian Agency and Reservation described in the bill of complaint, and inspected the irrigating ditch, described in the bill of complaint, from the point where it diverts the waters from Milk River to its extreme limits. The said ditch is about 18 feet wide at the head, and is about 14 miles in length on a straight line. The main ditch, however, extends, according to my opinion, about three miles, at which point it is divided into two branches. There are no laterals constructed from the main or branch ditches, but at varying intervals headgates have been constructed into the sides of these branch ditches. So far as I was able to observe there had been no irrigation of plowed lands from the said ditches, but various patches of hay land had been irrigated by turning the water out of the branch ditches through these headgates and allowing it to flow according to the natural flow of the land down to and upon the little patches of grass scattered about the reservation contiguous to the ditch. I talked with one Morgan, the Agency Farmer, and he told me that he had just commenced irrigating his plowed lands, and that during the year 1905 he had irrigated about 160 acres of hay land. I also saw the pump and pumping plant at the agency; the flume carrying the water from the said pump appeared to be, and was represented to me to be 11x20 inches, and there had been irrigated in the vicinity of the agency for the raising of garden crops not to exceed five acres of land. I do not know that the garden had been irrigated this year at all, but it appeared to be about five

acres in size, and they claimed to have irrigated that body of land.

N. A. SHARPLESS.

Subscribed and sworn to before me this 17th day of July, 1905.

[Seal]

STEPHEN CARPENTER,

Notary Public in and for said County and State.

[Endorsed]: Filed July 17, 1905. Geo. W. Sproule, Clerk.

Testimony.

And thereupon, after filing and reading the several affidavits introduced in behalf of the defendants in said cause, the complainant produced the following-named witnesses, who were duly sworn, and testified substantially as follows:

W. R. LOGAN testified substantially as follows: I am the United States Indian Agent, having charge and superintendency of the Fort Belknap Indian Reservation; I have been such agent on said reservation since the year 1902. That waters from said Milk River are used for household, culinary, domestic and irrigation purposes upon said reservation. That the means by which said waters are taken and diverted from said river consist of a pumping plant, used and operated for the purpose of supplying necessary waters, required for the maintenance of the agency and schools, and the irrigation of land immediately adjoining and surrounding the agency and school buildings. That there are two

(Testimony of W. R. Logan.)

pumping plants in operation: One pumping plant supplies the agency proper with water for household, domestic and irrigation purposes, and was constructed in 1889 and 1890, which is the time when the agency buildings were constructed and erected. The capacity of that pumping plant is 100 inches. The other pumping plant, supplying the schools and other buildings with the requisite amount of water, necessary to supply the same, was constructed in 1893 or 1894, and has a capacity of 150 inches, making a total capacity of the two plants 250 inches. That, in the year 1898, the Government commenced to construct a canal, tapping the waters of Milk River, for the purpose of conducting said water upon the Fort Belknap Indian Reservation, for the use of the Indians residing thereon, for irrigating purposes. That said ditch was extended from time to time, and is now about eleven miles long, consisting of two branches. That the said canal has been in operation, taking and diverting the waters of Milk River, ever since the year 1898, conducting the same upon said reservation for irrigating purposes. That ever since the year 1898, said waters have been used for irrigating purposes, and that, at this time approximately 5,000 acres of land are being irrigated upon said reservation, for the purpose of producing crops of hay, grain and vegetables. That these lands are irrigated with the waters diverted by means of said canal, and by means of the lateral ditches, dis-

(Testimony of W. R. Logan.)

tributing said waters from said canal upon the lands irrigated. That the cultivated area of the lands upon said reservation has been enlarged and extended from year to year, and that there are upon said reservation approximately about 30,000 acres of land, which are susceptible of irrigation, with waters of Milk River, taken and diverted through said canal. That the present necessities of the Indians upon said reservation, for household, domestic and irrigating purposes, require at lease five thousand inches of the waters of the stream.

C. T. PRALL testified substantially, as follows: I am a civil engineer, and a graduate of Cornell College. I am connected with the United States Geological Survey. On or about the 5th day of July, 1905, upon the request of the United States Indian Agent, Logan, I measured the water then diverted from Milk River, and flowing in the Government canal of the Belknap Reservation. I found flowing in said canal, at the time, one thousand inches of water, which was all the water flowing in Milk River, at the point of diversion, except about one hundred and fifty inches, which escaped through the dam. I did not make any measurements of the depth, width or grade of the canal, for the purpose of ascertaining the carrying capacity thereof; but from my observation of the size of the canal, and the amount of water flowing therein at that time, I estimated that the canal would carry at least five times the amount of water that was then flowing therein.

THOMAS M. EVERETT testified substantially as follows: I have resided at Harlem sixteen years, and have been familiar with the use of waters out of Milk River, above the Fort Belknap Indian Reservation ditch during that period of time. I know the defendants, Thomas Downs and John Buckley. When they first began using the waters of Milk River, they took them out through a ditch built by Davis and one Fisher. I also know the Matheson ditch. Several users of water through the Matheson ditch originally took water from Milk River, through the Fisher ditch. The Matheson ditch has been enlarged since it was first constructed, and several parties are now using water from it, who were not interested in it at the time it was built.

Mr. Everett further testified to the use of water from the said Indian Reservation, substantially corroborating the witness Logan.

[Endorsed]: Filed and entered Aug. 15, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of August, 1905, a memorandum order was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Memorandum Order.

HUNT, Judge, Orally:

I think that an injunction should be granted. Prior to 1888 nearly the whole of Northern Montana north of

the Missouri River and eastward from the main chain of the Rocky Mountains was recognized as Indian country, occupied in part by the tribes of Indians now living upon the Fort Belknap Reservation. By the treaty of May, 1888, the Indians "ceded and relinquished to the United States" their title and rights to lands not embraced within the reservation then established as their permanent homes. The purposes of the treaty were that means might be had to enable the Indians to become "self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization."

The consideration for the cession and relinquishment was that the United States should spend annually a large sum of money for the Indians in the purchase of live stock, agricultural implements, and other things, in assisting the Indians to build homes and inclose their farms, and in any other respect to promote their civilization, comfort and improvement.

Article III, Treaty of May 1, 1888, 25 Statutes at Large, 114.

The "cultivation of the soil" was also specially mentioned by Article V of the treaty.

A fair construction of the preamble and provisions of the treaty is that an essential object thereof was to encourage farming among the Indians. This being correct, notice of conditions of climate and soil of Montana tell us that water for irrigation is indispensable in successful farming throughout that portion of Montana wherein the Belknap Reservation lies.

The parties to the agreement evidently appreciated this necessity, and purposely fixed the boundary line of the reservation at a point in the middle of the main channel of Milk River opposite the mouth of People's Creek, and thence up Milk River in the middle of the main channel thereof to the place of beginning.

I believe the intention was to reserve sufficient of the waters to insure to the Indians the means wherewith to irrigate their farms.

This construction of the treaty seems to me to be in accord with the rules which the Supreme Court has repeatedly laid down in arriving at the true sense of treaties with Indians.

United States vs. Winans, decided May 15, 1905.

While in the treaty of October 8, 1895, reference is made to a scarcity of water which renders the pursuit of agriculture "difficult and uncertain," yet article II of that treaty expressly refers to the irrigation of the farms of the Indians.

Irrigation was undoubtedly contemplated and was provided for, although the treaty of 1895 recognized that probably the main reliance of the Indians for self-support would be found in cattle raising.

In my judgment, when the Indians made the treaty granting rights to the United States they reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees.

From this it follows that patents if any issued by the Land Department for lands held by defendants are subject to the treaty, and defendants can acquire no rights to the exclusion of the reasonable needs of the Indians. These needs appear to be five thousand inches. To that extent injunction will issue.

U. S. vs. Winans, *supra*.

WM. H. HUNT,
Judge.

August 7, 1905.

[Endorsed]: Filed and entered August 7, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 8th day of August, A. D. 1905, an interlocutory order for a general injunction was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Interlocutory Order.

A preliminary writ of injunction having been duly issued against the defendants in said above-entitled cause on the 26th day of June, A. D. 1905, and an order having been issued on said day, requiring the said defendants and each of them to show cause on the 17th day of July, A. D. 1905, why a general injunction during the pendency of this suit should not issue against them and each of them, as prayed for in complainant's bill of complaint, and the said defendants in pursuance of said

order so made as aforesaid, having duly appeared on said 17th day of July, A. D. 1905, and filed and submitted on said day their affidavits and the affidavits of other persons in opposition to the granting of the injunction pendente lite, as prayed for in complainant's bill of complaint, and other evidence having been submitted upon said hearing from which it appears that the said complainant, the United States of America, requires for its uses upon the Fort Belknap Indian Reservation not less than five thousand inches of the waters of Milk River for household, domestic, culinary and irrigating purposes, and that it is entitled to the use of said waters as against each of said defendants, and it appearing to the Court that the complainant is entitled to a general injunction during the pendency of this suit, enjoining and restraining said defendants, and each of them, from in any manner interfering with the use of said waters by the Government of the United States upon said Indian Reservation.

Now, therefore, in consideration of the premises, it is hereby ordered and adjudged that a general injunction during the pendency of this suit be, and the same is hereby granted against the said defendants, and each of them, and their attorneys, agents, servants and employees and of each of them, and it is further ordered that a writ of injunction during the pendency of this suit issue against said defendants, and each of them, and each of their agents, attorneys, servants and employees in accordance with the prayer of complainant's bill of complaint.

Dated this 8th day of August, A. D. 1905.

WILLIAM H. HUNT,
Judge.

[Endorsed]: Filed and entered August 8th, 1905.
Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of August, A. D.
1905, a petition for order allowing appeal was filed
herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Petition for Order Allowing Appeal.

Come now the above-named respondents Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andrew H. Resor, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, conceiving themselves to be aggrieved by the interlocutory order made and entered in the above-entitled cause, in the above-entitled court, on the 8th day of August, 1905, wherein and whereby it was ordered and decreed that the respondents, pending the official hearing and decree herein, be enjoined from in any manner interfering with the use by the Government of the United States upon the Fort Belknap Indian Reservation of not less than 5,000 inches of the waters of Milk River for household, domestic, culinary and irrigating purposes,

and by which interlocutory order complainant was awarded a general injunction during the pendency of this suit against the said respondents and each of them, and hereby petition said Court for an order allowing said respondents and each of them to prosecute an appeal from said interlocutory order granting said writ of injunction to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which said respondents shall give and furnish upon such appeal, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit. And your petitioners will ever pray, etc.

E. C. DAY,

Solicitor for Henry Winters, John W. Acker, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andrew H. Resor, Henry Corregan, Matheson Ditch Company, a Corporation, and Empire Cattle Company, a Corporation.

B. PLATT CARPENTER, and

STEPHEN CARPENTER,

Of Counsel for Said Respondents.

E. C. DAY and

JAS. A. WALSH,

Solicitors and of Counsel for all Respondents.

JAMES A. WALSH,
Solicitor for Chris Kruse and the Cook Irrigation Com-
pany.

SANDS & O'KEFFE and
C. C. NEWMAN,
Of Counsel for Said Respondents.

[Endorsed]: Filed and entered August 15th, 1905.
Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of August, A. D.
1905, an assignment of errors was duly filed herein,
being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Assignment of Errors.

The respondents file the following assignment of errors, upon which they and each of them will rely upon their appeal from the interlocutory order made by this Honorable Court on the 8th day of August, 1905, granting an injunction in said cause:

The respondents assign as error upon this appeal the following, to wit, the Circuit Court erred in making the interlocutory order granting an injunction in this case, for the following reasons:

1. The said Circuit Court erred in holding that by the treaty made and entered into the first day of May, 1888, between the United States and the Indians residing upon the Fort Belknap Indian Reservation, there was reserved to the said Indians the right to the use of the waters of Milk River to an extent reasonably neces-

sary to irrigate the lands included in the reserve created by the said treaty, and that by the said treaty there was reserved to the said Indians the right to the use of said waters at all.

2. The said Circuit Court erred in holding that the reservation of the waters of Milk River, if any, contained in the treaty of May 1, 1888, entered into by the United States, to the Indians residing upon the Fort Belknap Reservation, was binding upon respondents or any of them so as to affect the rights of the respondents to the use of the waters of the tributaries of said Milk River based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the State of Montana and decisions of its courts, and the customs of the country.

3. The said Circuit Court erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk River were superior to the rights of the respondents or either of them, for the reason that the proof showed affirmatively and without contradiction tht the respondents and each of them had diverted, appropriated and applied to a useful purpose the waters of the said river or its tributaries, according to the laws of the United States, the laws of the State of Montana and decisions of its courts, and customs of the country to the extent claimed by them, and there was no proof showing that there had ever been an appropriation of the said waters according to the said laws, decisions and customs of the said waters or any thereof

according to the said laws, decisions and customs by the said Indians, or on their behalf.

4. The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk River, or to the prior right to the use of the said waters at all.

In order that the foregoing assignment of errors may be and appear of record the respondents present the same to the Court and pray that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

CARPENTER, DAY & CARPENTER,

Solicitors for Henry Winters, et al.

WALSH & NEWMAN,

Solicitors for Cook's Irrigation Company, et al.

[Endorsed]: Filed and entered August 15, 1905.
Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 15th day of August, A. D. 1905, an order allowing appeal was duly made and entered herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Order Allowing Appeal.

Upon motion of said Messrs. E. C. Day and James A. Walsh, Esq., counsel for respondents and upon filing the petition of Henry Winters, John W. Acker, Chris Kruse, Agnes Downs, Thomas Downs, Bertha Resor, Lydia Resor, Ezra T. Resor, Andrew H. Resor, Henry Corregan, Matheson Ditch Company, a corporation, Cook's Irrigation Company, a corporation, and the Empire Cattle Company, a corporation, for an order allowing appeal, together with assignment of errors:

It is ordered that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory order entered August 8, 1905, granting an injunction pendente lite against respondents herein; that the amount of the bond upon said appeal be and is hereby fixed at the sum of three hundred dollars; and that a certified copy of the records and proceedings herein be prepared and transmitted to the said Circuit Court of Appeals August 15th, 1905.

WILLIAM H. HUNT,

Judge.

[Endorsed]: Filed and entered August 15, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the the 15th day of August, A. D. 1905, a bond on appeal was duly filed herein, being in words and figures as follows, to wit:

[Title of Court, Title of Cause.]

Bond on Appeal.

Know all men by these presents, that we, Henry Winters, et al., as principals, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland for the purpose of becoming surety upon bonds and obligations required by law, as surety, are jointly and severally held and firmly bound unto the above-named the United States of America in the sum of three hundred dollars, lawful money of the United States of America, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the 15th day of August, A. D. 1905.

The condition of the above obligation is such that, whereas, the said Henry Winters, et al., have taken an appeal to the Circuit Court of Appeals for the Ninth Circuit, to reverse the interlocutory order rendered and entered by the Circuit Court of the United States for the Ninth Judicial Circuit, in and for the District of Montana, which order was made and entered in the above-entitled suit on the 8th day of August, 1905.

Now, therefore, the condition of the above obligation is such that if the above-named Henry Winters, et al., appellants herein, shall prosecute said appeal to effect, and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY WINTERS, JOHN W. ACKER, AGNES
DOWNS, THOMAS DOWNS, BERTHA RESOR,
LYDIA RESOR, EZRA T. RESOR, ANDREW
H. RESOR, HENRY CORREGAN, MATHESON
DITCH COMPANY, a Corporation, and EMPIRE
CATTLE COMPANY, a Corporation,

By CARPENTER, DAY & CARPENTER,
Their Attorneys.

CHRIS KRUSE, and
COOK'S IRRIGATION COMPANY,

By WALSH & NEWMAN,
Their Attorneys.

THE UNITED STATES FIDELITY AND
GUARANTY CO.,

[Corporate Seal] By FRANK BOGART,
Attorney in Fact.

[Endorsed]: The within bond is hereby approved this
15th day of August, 1905.

WILLIAM H. HUNT,
Judge.

Filed and entered August 15, 1905. Geo. W. Sproule,
Clerk.

And thereafter, to wit, on the 15th day of August, A. D. 1905, a citation was duly issued herein, being in the words and figures as follows, to wit:

Citation.

UNITED STATES OF AMERICA—ss.

President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 14th day of September next, pursuant to an order allowing an appeal entered in the clerk's office of the Circuit Court of the United States for the District of Montana, in that certain action numbered 747, in which Henry Winters and others are respondents and appellants, and you are the complainant and appellee, to show cause, if any there be, why the interlocutory order made and entered against the said respondents and appellants as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. HUNT, Judge of the United States District Court, in and for the District of Montana, this 15th day of August, 1905.

WILLIAM H. HUNT,
District Judge.

Service of the within citation and receipt of a copy thereof admitted this 15th day of August, 1905.

CARL RASCH,
United States District Attorney, Solicitor for Appellee
and Complainant in Lower Court.

[Endorsed]: Filed and entered Aug. 15th, 1905. Geo.
W. Sproule, Clerk.

Clerk's Certificate to Transcript.

United States of America, }
District of Montana. } ss.

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 142 pages, numbered consecutively from 1 to 142, is a true and correct transcript of the pleadings, process, orders, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of sixty-five 75/100 (\$65.75) dollars and has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 18th day of August, A. D. 1905.

[Seal]

GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1243. United States Circuit Court of Appeals for the Ninth Circuit. Henry Winters et al., Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed September 2, 1905.

F. D. MONCKTON,
Clerk.